

Docket Number: <u>58-0102-0505</u> Effective Date: <u>2007 Sine die</u> Rules Title: <u>Water Quality Standards</u> Agency Contact and Phone: <u>Don Essig, 373-0119</u>	Public Notice Negotiated Rule Making: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Groups Involved: sign-in sheet attached
Descriptive Summary of Rule: In this rulemaking, the Department of Environmental Quality (DEQ) proposes to add language to Section 053, Beneficial Use Support Status, that codifies support for an existing policy which allows consideration of frequency of exceedance of numeric criteria for certain water quality parameters (pH, turbidity, DO, and temperature) in assessing achievement of water quality objectives and support of beneficial uses. DEQ also proposes to revise several definitions to improve clarity and utility and to make other miscellaneous corrections. The proposed revisions at Subsections 100.01.b., 250.02.f., and 250.04 have been included for consistency with existing rule text and to determine DEQ's determination of spawning periods. Public comments were received and the proposed rule has been revised. DEQ recommends that the Board adopt the rule, as presented in the final proposal, as a pending rule with the final effective date coinciding with the adjournment <i>sine die</i> of the First Regular Session of the Fifty-ninth Idaho Legislature. The rule is subject to review by the Legislature before becoming final.	Hearings: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Locations and Dates: N/A
	Written Comment Deadline: 7/7/06
	Cost Impact: Agency: No added agency implementation costs are expected; added clarity, if achieved, may reduce costs. Regulated Community: None anticipated.
	Relevant Statutes: Idaho Code 39-105, 39-107, and 39-3601 et seq.
	Idaho Code § 39-107D Statement: The revisions included in this proposed rule are not broader in scope, nor more stringent, than federal regulations and do not regulate an activity not regulated by the federal government. Idaho Code § 67-5221(c) Fiscal Impact Statement: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: N/A

Docket Number: <u>58-0102-0505</u>				
Section	Existing Rule Summary	Temporary and/or Proposed Rule Summary	Summary of Rule Changes Based on Public Comment	Outstanding Issues
010	Definitions.	Definitions added, revised, and/or deleted to improve clarity and utility and to make miscellaneous corrections.	This section has been changed. See attached Response to Comments.	<i>Further revisions were made to the definitions of Ephemeral Waters (proposed text removed) and Natural Background Conditions ("mineralogy" was replaced with "geologic disturbance") as a result of discussions that took place during the October 11, 2006 meeting of the Board of Environmental Quality.</i>
053	Beneficial Use Support Status.	The proposed rule codifies support for an existing policy which allows consideration of frequency of exceedance of numeric criteria for certain water quality parameters (pH, turbidity, DO, and temperature) in assessing achievement of water quality objectives and support of beneficial uses.	No comment received. No change.	None
100	Surface Water Use Designations.	Subsection 100.01.b. includes a minor revision for consistency with existing rule text.	No comment received. No change.	None
200	General Surface Water Quality Criteria.	N/A	This section has been changed. See attached Response to Comments.	None
250	Surface Water Quality Criteria for Aquatic Life Use Designations.	Subsections 250.02.f. and 250.04 include minor revisions for consistency with existing rule text and to determine DEQ's determination of spawning periods.	No comment received. No change.	None

DEQ'S RESPONSE TO COMMENTS

Commenter: Hecla Mining Company

Comment 1: The definitions of both 'Acute Criteria' and 'Chronic Criteria' should be deleted and left to guidance and site-specific negotiation. It is our understanding that EPA has no scientific basis at all for the time intervals associated with either the acute or chronic criteria. The Court's findings in the National Toxics Rule (NTR) litigation directed to EPA to scientifically justify these time intervals and, to our knowledge, EPA has failed to meet this directive from the Court. Therefore, use of EPA criteria, which are undefined in federal regulation, violate the "no more stringent" requirements of Idaho Code as well as statutory requirements to use valid science.

Response: *These are revisions of existing definitions that have been in rule since August 1994 when Idaho incorporated the National Toxics Rule by reference. These terms used in section 210 of the rules, Numeric Criteria for Toxic Substances For waters Designated For Aquatic Life, Recreation, Or Domestic Water Supply Use. All that was done was to consolidate multiple existing and largely redundant definitions. They are consistent with long established usage by EPA nationally and by DEQ in Idaho; therefore, DEQ recommends these definitions be retained.*

Comment 2: The definition of "Ephemeral Waters" needs to be reviewed in the light of the recent Supreme Court decision in 'RAPANOS ET UX., ET AL. v. UNITED STATES' in order to comply with Idaho Code stringency provisions per the Federal Pollution Control Act.

Response: *DEQ has reviewed this definition in light of 'RAPANOS ET UX., ET AL. v. UNITED STATES'. The Rapanos decision does not require DEQ to modify the language it added to the definition of ephemeral waters. First, the purpose of the added language was not to change the universe of ephemeral waters in Idaho, or how water quality standards may or may not apply to them. The proposed revision to the definition was made solely to be more descriptive, and to provide a user of the definition cues to visually recognize such waters. The language was carefully negotiated by those that participated in negotiations.*

Second, regardless of whether or not ephemeral waters are "waters of the United States", DEQ believes it is important to identify and distinguish them from other waters; perhaps more so if they are not 'subject to regulation'. DEQ believes the revised definition will make that necessary task easier. Moreover, DEQ believes it is prudent, and within the best interest of existing and potential future dischargers of pollutants to Idaho's waters, to better define what are ephemeral waters in Idaho. Doing so could facilitate future setting of uses and criteria more appropriate for such waters rather than presume they support cold water aquatic life.

Third, DEQ does not believe the Rapanos decision precludes the application of the Clean Water Act (CWA) to ephemeral waters. As the comment from the Idaho Mining Association (set out below) notes, the plurality decision, authored by Justice Scalia, concludes that the CWA jurisdictional test should include whether ditches or drains near wetlands are "waters" in the ordinary sense of containing a relatively permanent flow. Justice Kennedy's concurring opinion, however, specifically rejects the notion that there must be a continuous flow for a water body to be governed by the CWA. Justice Kennedy stated: "The plurality's first requirement – permanent standing water or continuous flow, at least for a period of 'some months' makes little practical sense in a statute [The Clean Water Act] concerned with downstream water quality." Thus, under Kennedy's opinion, an ephemeral water may still fall within the scope of the CWA if a significant nexus to navigable water is present. The dissenting opinion, authored by Justice Stevens, concludes that the Army Corps of Engineers interpretation of waters of the United States to extend to wetlands adjacent to tributaries of traditionally navigable waters is a reasonable interpretation that should be upheld. The dissenting opinion also rejects the notion that there must be a continuous surface connection between the wetland and a neighboring creek.

It is unclear how the Rapanos case will be applied to future litigation involving the jurisdictional scope of the CWA. In his concurring opinion, Chief Justice Roberts lamented the fact no opinion commanded a majority of the court. Justice Roberts then cited to Grutter v. Bollinger, 539 U.S. 306 (2003) and Marks v. U.S., 430 U.S. 188 (1977). In Marks the court held that when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. Meanwhile,

the dissenting opinion suggests that on remand, judgments should be reinstated if either the test advocated by Justice Kennedy or the test described by Justice Scalia is met. Given the court's fragmented decision, DEQ can not conclude that ephemeral waters are categorically excluded from regulation under the CWA, and state law implementing the CWA.

Comment 3: We support the comments of the Idaho Mining Association (IMA) concerning the definitions of both 'Natural Background Conditions' and 'Short-Term or Temporary Activity'.

Response: *See response to IMA comments.*

Commenter: Idaho Mining Association (IMA)

Comment 1: Change in the definition of "Ephemeral Waters."

We recommend that no change be made to the existing definition of 'Ephemeral Waters'

On June 19, 2006 the United States Supreme Court ruled in *RAPANOS v. UNITED STATES* that under the Clean Water Act, "*the phrase 'waters of the United States'*

. . . does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."

This decision clarifies the difference between "permanent, standing or continuously flowing bodies of water" and ephemeral waters. Idaho's existing definition of ephemeral waters captures this concept.

The 2006 Idaho Legislature approved HCR 64. This resolution addressed a number of issues related to water quality. Three important clauses contained in that resolution were:

WHEREAS, the Idaho Water Quality Act states the Legislature's intent that the state of Idaho fully meet the goals and requirements of the Clean Water Act and that the rules promulgated to implement the Clean Water Act not impose requirements beyond those of the Clean Water Act; and

WHEREAS, it is the Legislature's intent that Idaho's surface water quality standards not apply to manmade waterways and private waters within the state unless otherwise required by the Clean Water Act;

BE IT FURTHER RESOLVED that the Legislature encourages the Department of Environmental Quality to take full advantage of the flexibility available under the Clean Water Act, the Idaho Ground Water Quality Plan and Idaho laws and rules in defining, adopting and implementing mixing zones, variances, site-specific conditions, criteria and water quality standards.

We believe it is clear that it is the legislature's intent that a waterbody that is not a water of the United States under the Clean Water Act should not be subject to regulation in Idaho Water Quality Standards. We recommend that an explicit statement be added in IDAPA 58.01.02.101 similar to "private waters" at 101.03 which provides that water quality standards do not apply to ephemeral waters.

Response: *See response to Hecla Mining Company's Comment 2 above regarding the Rapanos decision. In addition, DEQ responds as follows:*

The application of criteria to waters based on flow is the subject of another rulemaking currently underway (Docket 58-0102-0601, proposed rule published in the

September 6, 2006 Idaho Administrative Bulletin). In that rulemaking DEQ is trying to limit the application of some numeric criteria in ephemeral and other waters, when flows are very low. This arose out of triennial review of Idaho's water quality standards, and while this will fall short of IMA's recommendation that "water quality standards do not apply to ephemeral waters", it does aim for a more practical treatment of waters whose water quality potential is at times limited by flow.

IMA's recommendation that "water quality standards do not apply to ephemeral waters" was previously proposed by DEQ in Docket 16-0102-9704. That proposal was changed in response to comment that pointed out the contribution ephemeral waters make to downstream water quality when they do flow. DEQ agrees this is an important consideration and finds it is still important to recognize this contribution to downstream water quality. Therefore, DEQ believes that, at a minimum, narrative criteria should apply to ephemeral waters when such waters otherwise fit within the scope of state and federal water quality regulation.

Comment 2: Change in the definition of "Natural Background Conditions."

Neither the current language of the rule or the proposed change actually constitute a definition. We recommend the following definition be used:

Natural Background Conditions. The physical, chemical, biological, or radiological condition that would exist absent human sources of pollution within the watershed. Natural disturbances, including, but not limited to, wildfire, geologic disturbance, diseased vegetation, or flow extremes that affect the physical, chemical, biological or radiological conditions of the water are part of natural background conditions. Natural background conditions inherently vary with time and place and should be described and evaluated in the context of this definition.

This definition is patterned after the existing definition of "Background." It changes the term "mineralogy" to "geologic disturbance" and adds "radiological" to the second sentence. [Note: the term "radiological" should also be added to the definition of "Background."] It deletes the phrasing that indicates that these conditions "are not usually the best possible conditions" and then combines the last two sentences in the proposed definition into one sentence.

We appreciate the concern for clarifying the concept of "lowering water quality" but this concept is inappropriate in a definition. We recommend that a new section be added to the rule that would read:

If natural background conditions exceed any numerical criteria, natural background conditions shall become the standard unless the Department determines that human sources of pollution have caused a lowering of water quality.

Response: DEQ agrees that the definition is not written in a typical form and agree that it should be modified.

In response to IMA, DEQ proposes the following in place of its proposed revision to the definition:

5956. Natural Background Conditions. ~~No measurable change in~~ The physical, chemical, biological, or radiological conditions existing in a water body without human sources of pollution within the watershed. Natural disturbances including, but not limited to, wildfire, mineralogy, diseased vegetation, or flow extremes that affect the physical, chemical, and biological integrity of the water are part of natural background conditions. Natural background conditions should be described and evaluated taking into account this inherent variability with time and place.

DEQ believes the phrase "are not usually the best possible conditions" captured an important concept in natural background conditions – that, because of inherent variability of nature, natural conditions on average will often be less than their maximum potential. Because of natural disturbance there will always be areas that have not yet reached their full (maximum) natural potential. Therefore, over larger areas (e.g., a watershed) natural conditions are rarely if ever as good as they can get on a more localized scale (e.g., a stand). This does not mean DEQ should manage to a naturally disturbed condition, but it does mean that even if DEQ manages for full natural potential, we will rarely reach it. This needs to be recognized and accepted. Furthermore, natural conditions are composed of gradients, such that local potential, while being as good as it gets, will only be optimal for some species and less than optimal for the rest. Thus observation of less than full natural potential or suboptimal conditions for a particular watershed does not necessarily indicate lack of natural conditions. DEQ believes the simplified definition

implies this to be so and that explicit mention of this in the definition is therefore not crucial.

The concept of a measurable change or lowering of water quality is very important to a practical application of this definition. So the Department proposes the following change to the existing language in section 200.09.

09. Natural Background Conditions as Criteria. *When natural background conditions exceed any applicable water quality criteria set forth in Sections 210, 250, 251, 252, or 253, the applicable water quality criteria shall not apply; instead, ~~pollutant levels shall not exceed the~~ there shall be no lowering of water quality from natural background conditions. Provided, however, except that temperature levels may be increased above natural background conditions when allowed under Section 401.*

This combined change in the rules is in DEQ's view a marked improvement in construct. DEQ could not agree to dropping of the "No measurable change in" language from the definition of natural background conditions without the proposed modification of Natural Background Conditions as Criteria above.

Comment 3: Change in definition of "Short Term or Temporary Activity." We recommend that no change be made in this definition.

Mining activities are often limited by weather and many mines operate in locations with very limited construction or operating seasons. Some activities undertaken in these areas may require two seasons to complete and may exceed the proposed one-year limitation. In addition, completing short-term or temporary activities as quickly as possible may significantly increase the cost of completion with no commensurate improvement in water quality. We believe the current practice of having these issues determined on a case-by-case basis by the Director has worked well and should remain in the rule.

Response: *Regionally EPA is scrutinizing Washington's short term modifications from water quality standards, believing they are being abused and may be contrary to the CWA. These are similar to Idaho's short term activity exemptions (STAEs). While it is difficult to provide a precise definition of short-term that will fit all situations, EPA is on record in the 1998 Advance Notice of Proposed Rulemaking and in their Water Quality Standards Handbook as believing short-term means "weeks or months, not years". A key concept is that every reasonable means should be employed to minimize the duration and magnitude of allowed departures from water quality standards. Concern over administrative relief from meeting standards increases with the length, as well as scope, of such allowances. Idaho's rules fairly well proscribe the scope of STAE's, but without the proposed rule there is no limit on their length. DEQ believes that longer term relief from water quality standards should be dealt with as a variance that is subject to the factors set forth in 40 CFR 131.10(g).*

DEQ believes its original proposal is a reasonable and modest step in limiting the length of STAEs that retains most of the flexibility afforded by STAEs, while hopefully preserving them as a legitimate tool under the CWA.

Commenter: Idaho Association of Commerce & Industry (IACI)

Comment 1:

010.82: Definition of Short-Term or Temporary Activity:

We recommend that no change be made in this definition.

The term "as short as possible" is difficult to determine and may require unnecessary expense. Many natural resource and construction activities, even though limited in scope and with only minimal impact, may last more than one year or occur infrequently over a number of years because of weather or other factors. The current definition does give the Director discretion, and to the best of our knowledge, the process has worked well.

Response: *DEQ agrees that "as short as possible" may be difficult to determine, but believes it is an important principle that indicates more clearly the intent of short term activity exemptions that may be granted by DEQ. DEQ sees no reason the process should not continue to work well under the proposed revision. See also response to IMA Comment 3 above.*

Comment 2:

010.31: Definition of Ephemeral Waters:

We recommend no change in the definition, as we believe the current definition is clear. We also recommend that an explicit statement be added in IDAPA 58.01.02.101 similar to “private waters” at 101.03, which provides that water quality standards do not apply to ephemeral waters.

On June 19, 2006 the United States Supreme Court ruled in *RAPANOS v. UNITED STATES* that under the Clean Water Act, “*the phrase ‘waters of the United States’ . . . does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.*”

This important decision helps clarify the difference between “permanent, standing or continuously flowing bodies of water” (streams, oceans, rivers and lakes) and ephemeral waters. Idaho’s current definition of ephemeral waters captures this concept. We believe that if a water body is not a water of the United States under the Clean Water Act then it should not be subject to regulation in Idaho Water Quality Standards.

Response: See response to Hecla Comment 2 and IMA Comment 1 above.

Comment 3:

010.56: Definition of Natural Background Conditions

We recommend this definition be re-written for clarity and to better correspond with the definition of “background.”

We support the following definition suggested by the Idaho Mining Association, an IACI member:

Natural Background Conditions. The physical, chemical, biological, or radiological condition that would exist absent human sources of pollution within the watershed. Natural disturbances, including, but not limited to, wildfire, geologic disturbance, diseased vegetation, or flow extremes that affect the physical, chemical, biological or radiological conditions of the water are part of natural background conditions. Natural background conditions inherently vary with time and place and should be described and evaluated in the context of this definition.

Also, in order to more appropriately capture the concepts proposed in the definition in the subject rule, IACI recommends a new subsection at IDAPA 58.01.070.08 as follows:

.08 Natural Background. If natural background conditions exceed any numerical criteria such natural background conditions shall become the standard unless the Department determines that human sources of pollution have caused a lowering of water quality.

Response: See response to IMA Comment 2 above.